

Case No. A-20-000015

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IN THE NEBRASKA COURT OF APPEALS

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IN THE INTEREST OF BROOKLYN S.

Child Under Eighteen Years of Age.

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APPEAL FROM THE SEPARATE JUVENILE COURT  
FOR DOUGLAS COUNTY, NEBRASKA

Honorable Christopher Kelly,  
Juvenile Court Judge

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BRIEF OF APPELLEE

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## **STATEMENT OF THE BASIS OF APPELLATE COURT JURISDICTION**

The Appellant has provided a statement as to the basis of the jurisdiction of the appellate court as required by certain Nebraska statutes. The State would add that the jurisdiction of this Court is invoked per statutes, which provide in relevant part that,

Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from the district court to the Court of Appeals. The appellate court shall conduct its review within the same time and in the same manner prescribed by law for review of an order or judgment of the district court, except as provided in sections 43-287.01 to 43-287.06 and except that when appeal is taken from a finding by the juvenile court terminating parental rights, the cause shall be advanced for argument before the appellate court and the appellate court shall, in order to expedite the preferred disposition of the case and the juvenile, render the judgment and write its opinion, if any, as speedily as possible.

*Neb. Rev. Stat. § 43-2,106.01 (Reissue 2010).*

It has been acknowledged that these actions before the juvenile court are determined to be a “special proceeding” for appellate purposes... To be appealable, the order in the special proceeding must affect a substantial right... It is well settled that a judicial determination made following an adjudication is a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order.

*In re Tabatha R.*, 255 Neb. 818, 827, 587 N.W.2d 109, 116 (1998).

The judgment of the Separate Juvenile Court of Douglas County, Nebraska is a final order as defined above and this appeal was properly filed herein thus conferring jurisdiction upon the Appellate Court.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Kwamayne Jackson (“Appellant”) is the biological father to Ky’Ari Jackson (DOB: March 2016) (Hereinafter “minor child”). On or about May 30, 2019, the State filed a Supplemental Petition alleging the minor child to be within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)*. On or about September 3, 2019, the State filed an Amended Supplemental Petition and Termination of Parental Rights alleging that the child is within the meaning *Neb. Rev. Stat. § 43-247(3)(a)*, *Neb. Rev. Stat. §§ 43-292(2), (9), and (10)(d)*, by reason of the faults or habits of Appellant, and that termination of parental rights was in the best interests of the minor child. The petition also alleged *Neb. Rev. Stat. §§ 43-283.01* applied, and that reasonable efforts were not required because Appellant had subjected said juvenile to aggravated circumstances and had committed a felony assault which resulted in serious bodily injury to the juvenile or another minor child of the parent.

In an order dated December 9, 2019, the Separate Juvenile Court found the minor child to be within the meaning of *Neb. Rev. Stat. § 43-247(3)(a)* by a preponderance of the evidence insofar as Appellant is concerned. The Court also found that the minor child was within the meaning of §§ 43-292(2), (9), and (10)(d) by clear and convincing evidence insofar as Appellant is concerned. The Court terminated Appellant’s parental rights to Ky’Ari Jackson. Appellant appeals.

### **The Issues Tried to the Court**

The issues tried before the juvenile court at the time of adjudication on November 14 and December 2, 2019 was if the minor child was within the meaning *Neb. Rev. Stat. § 43-247(3)(a)*,

*Neb. Rev. Stat.* §§ 43-292(2), (9), (10)(d), and § 43-283.01 and whether termination of Appellant's parental rights was in the best interest of the minor child.

### **How the Issues were Decided**

On December 9, 2019, the Separate Juvenile Court found the minor child to be within the meaning of *Neb. Rev. Stat.* § 43-247(3)(a) by a preponderance of the evidence insofar as Appellant was concerned. The Court also found that the minor child was within the meaning of §§ 43-292(2), (9), (10)(d), and § 43-283.01 by clear and convincing evidence insofar as Appellant was concerned. The court also found termination of parental rights to be in the best interests of the minor child and ordered that Appellant's parental rights be terminated.

### **Scope of Review**

Juvenile cases are reviewed *de novo* on the record, and the Appellate Court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Michael R.*, 11 Neb. App. 903 (2003). However, when the evidence is in conflict, the Appellate Court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* In reviewing questions of law arising under the Nebraska Juvenile Code, the Appellate Court must reach conclusions independent of the lower court's ruling. *In re Interest Ty M. & Devon M.*, 265 Neb. 150 (2003).

## **PROPOSITIONS OF LAW**

### **I.**

The Juvenile Court shall have jurisdiction over any juvenile who lacks proper parental care by reason of the faults or habits of his or her parent. *Neb. Rev. Stat.* § 43-247 (3)(a). A child may be found within the meaning of *Neb. Rev. Stat.* § 43-247 (3)(a) when the juvenile lacks proper parental care due to the reason or the fault or habits of his or her parent, guardian, or custodian.

## II.

The State need not prove that the juvenile has actually suffered harm, but must establish that without intervention, there is a definite risk of future harm. *In re Carrdale H. II*, 781 N.W.2d 622 (2010).

## III.

The juvenile court does not have to wait for harm to befall a minor child in order to acquire jurisdiction over said child. *In re Justine J.*, 286 Neb. 250, 253, 835 N.W.2d 674, 677-678 (2013).

## IV.

A parent's right to their child can be terminated upon showing sufficient evidence exists that termination of the parental rights is in the best interest of the minor and that it appears by the evidence that one or more of the conditions listed in the eleven subsections exist. *Neb. Rev. Stat.* § 43-292.

## V.

Under *Neb. Rev. Stat.* § 43-292, any one of the eleven grounds can serve as a basis for the termination of parental rights when combined with evidence that termination is in the best interests of the child. The State must prove, by clear and convincing evidence, that one of the statutorily enumerated grounds for termination exists and that termination is in the child's best interests. *In re Sir Messiah T.*, 279 Neb. 900 (2010).

## VI.

According to *Neb. Rev. Stat.* § 43-292(2), the court may terminate all parental rights between the parents of a child, for neglect, when the court finds such action to be in the best interest of the child; and the evidence shows that the parent has substantially and continuously or repeatedly

neglected and refused to give the child or a sibling of the child necessary parental care and protection. *Neb. Rev. Stat.* § 43-292(2).

## VII.

A ‘neglected child’ is a child under eighteen years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals or well-being of such child. *In re Hartman*, 188 Neb. 682 (1972).

## VIII.

The Supreme Court of Nebraska has held although incarceration itself may be involuntary, as far as the parent is concerned, the criminal conduct causing the incarceration is voluntary. *In re Interest of Zanaya W.*, 291 Neb. 20, 863 N.W.2d 803 (2015).

## IX.

Under *Neb. Rev. Stat.* § 43-292 (9), termination of parental rights is warranted if the parent of a juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. *Neb. Rev. Stat.* § 43-292(9).

## X.

Aggravated circumstances have been held to embody the concept that the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and place the child in a position to be re-abused. *In re Interest of Jac'Quez N.*, 266 Neb. 782 (2003).



## **XI.**

Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. *Neb. Rev. Stat.* § 43-283.01(4)(a).

## **XII.**

The determination of whether aggravated circumstances exist must be made on a case-by-case basis. *In re Jac'Quez N.*, 266 Neb. 782, 790-792 (2003).

## **XIII.**

In establishing criteria to determine the existence of aggravated circumstances, certain common themes exist. These include if reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be re-abused. *In re Jac'Quez N.*, 266 Neb. 782, 790-792 (2003).

## **XIV.**

Termination of parental rights is warranted when the parent has committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent. *Neb. Rev. Stat.* § 43-292 (10)(d).

## **XV.**

A person commits a felony assault if he intentionally, knowingly, or recklessly, causes bodily injury to another person. *Neb. Rev. Stat.* § 28-310.

## **XVI.**

Ultimately the primary consideration in determining whether to terminate parental rights is a determination of what is in the best interest of the child. *In re Interest of J.H.*, 242 Neb. 906, 910-911 (1993).

## **XVII.**

Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In Re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

## **XVIII.**

The evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interest of the juvenile, as it would show abandonment, neglect, unfitness, or abuse. *In re Interest of Joseph S.*, 291 Neb. 953, 963 (2015).

## **STATEMENT OF FACTS**

### **Procedural History**

On May 30, 2019, the State filed a Supplemental Petition, as it relates to Appellant's biological child Ky'Ari Jackson. (T 6,7) The State simultaneously filed an Ex Parte Motion for Immediate Custody as it related to Appellant. (T8) The State offered "Exhibit A," an affidavit authored under oath and signed by Detective Lisa Crouch on May 30, 2019, in support for immediate custody. (T 9)

On the same day the Court filed an Ex Parte Order for Immediate Custody. (T 11-12) The Court found the minor child to be seriously endangered in her surroundings, and that immediate removal appeared to be necessary for the minor child's protection. Accordingly, the

Court ordered that the Nebraska Department of Health and Human Services (“NDHHS”) shall take temporary custody of the juveniles for placement in foster care or other appropriate placement and that placement shall exclude the home of Appellant. (T 12)

On June 11, 2019, the Court filed a First Appearance, Protective Custody Order and Notice, as it pertained to Appellant. (T 21-25) Appellant was advised of his rights pursuant to 43-279.01. The Court found that due to exigent circumstances, it would be contrary to the health and safety of the minor child to be returned home at that time; and that it is in the best interests of the minor child, to remain in the temporary custody of NDHHS, to exclude the home of Appellant. (T 22)

On September 3, 2019, the State filed an Amended Supplemental Petition and Termination of Parental Rights regarding Appellant. (T37-39) Count I alleged that the minor child was within the meaning of *Neb. Rev. State. §43-247(3)(a)(3)* as lacking proper parental care by reason of the fault or habits of Appellant, in that (A) Appellant was a caregiver of Ky'Lynn Jackson; (B) Ky'Lynn Jackson was transported to the hospital due to being unresponsive; (C) At the hospital, Ky'Lynn Jackson was diagnosed with injuries consistent with intentional physical abuse; (D) Appellant was unable to provide a reasonable explanation for Ky'Lynn's injuries; (E) Appellant has failed to provide, proper parental care, support and/or supervision for said juveniles; (F) Due to the above allegation, said juveniles are at risk for harm. (T 37)

Count II alleged that the minor child comes within the meaning of *Neb. Rev. Stat. §43-292 (2)*, because Appellant, father of said child, has substantially and continuously or repeatedly neglected and refused to give said child or a sibling of said child necessary parental care and protection. (T 38)

Count III alleged that the minor child comes within the meaning of *Neb. Rev. Stat. §43-292 (9)*. (T 38) The State alleged that Appellant has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. (T 38)

Count IV alleged that the minor child comes within the meaning of *Neb. Rev. Stat. §43-292 (10)(d)*. (T 38) The State alleged that Appellant committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent pursuant to of *Neb. Rev. Stat. §43-292 (10)(d)*. (T 38)

Count V alleged that Reasonable efforts under *Neb. Rev. Stat. §43-283.01 (Reissue 1998)* are not required because Appellant, subjected said child to aggravated circumstances including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. (T 38)

Count VI alleged that terminating the parental rights of Appellant, with respect to the minor child, is in the best interests of said juvenile. (T 39)

An Adjudication Hearing on the Amended Supplemental Petition and Termination of Parental Rights with respect to Appellant, was held on November 14, 2019, before the Honorable Christopher E. Kelly. (T 53) The Court found that notice, service and jurisdiction of the Court in this matter were proper and that Appellant is incarcerated and refused to be transported to this hearing despite the Court having made transportation arrangements for him.

The Court continued its First Appearance and Adjudication Hearing on the Supplemental Petition and Termination of Parental Rights on December 2, 2019, before the Honorable Christopher E. Kelly. (T 63) Appellant appeared before the court and was advised of his rights pursuant to *Neb. Rev. Stat. §43-279.01*. (T63)

In an order dated December 9, 2019, the Separate Juvenile Court filed a First Appearance, Adjudication and Termination of Parental Rights Order, and a Contempt Citation and Order as it relates to Appellant. (T63-67) The Court noted that during the proceedings, Appellant became repeatedly loud and confrontive to his attorney and to the mother in the courtroom and ignored multiple admonitions by the Court, being so disruptive to the proceedings that he was held in contempt of the Court and excused from the Courtroom. The Court ordered Appellant be sentenced to 30 days jail on his contempt citation to be served concurrently with his present incarceration. (T 64)

Furthermore, the Court found (A) that Counts I (A, B, C, D, E and F) of the Amended Supplemental Petition and Termination of Parental Rights are true by a preponderance of the evidence; (B) that the minor child is within the meaning of Section 43-247 {3a) by a preponderance of the evidence insofar as Appellant is concerned; (C) that Counts II, III, IV, V and VI of the Amended Supplemental Petition and Termination of Parental Rights are true by clear and convincing evidence; (D) that the minor child is within the meaning of Section 43-292 (2), (9) and (10) by clear and convincing evidence insofar as Appellant is concerned; (E) that it is in the best interest and welfare of the minor child that the parental rights of Appellant be terminated; (F) that it is in the best interest and welfare of the minor child to remain in the custody of the NDHHS, State of Nebraska/PromiseShip, for appropriate planning and placement. (T 65)

The Court ordered that the parental rights of Appellant, to the minor child be terminated. (T 65) Appellant appeals these decisions.

## **Factual History**

On November 14, 2019, the State's Amended Supplemental Petition and Motion for Termination of Parental Rights came before the juvenile court for adjudication. The court heard testimony from the following witnesses: Dr. Suzanne Haney, a licensed child abuse pediatrician employed at Children's Hospital and Medical Center; James Zeman, an employee for Global Tel Link, Inc.; Lisa Crouch, a detective for the Omaha Police Department; and Paige Worley, a family permanency specialist at St. Francis Ministries. (15:6-290:12)

The first witness called to testify on behalf of the State was Dr. Suzanne Haney. (15:4) Dr. Haney is a child abuse pediatrician employed by Children's Hospital and Medical Center in Omaha. (15:8-11;16:23-24) A child abuse pediatrician is already a general pediatrician that goes on to do three more years of training in child abuse pediatrics and must pass the board of examination. (52:17-21) She explained that she is regularly asked by other physicians to consult on cases where there's suspected child abuse. (17:23-25;18:1)

Dr. Haney was called to consult with Ky'Lynn Jackson, Ky'Ari's infant sister, at Nebraska Medicine on May 30, 2019. (21:22-24) Her understanding as to why she was being asked to consult was that Ky'Lynn had been brought to Nebraska Medicine on May 29, 2019, with an episode of unresponsiveness and stopped breathing in the emergency room. (23:23-25)

Dr. Haney testified that she reviewed Ky'Lynn's medical records when she arrived at the hospital. (22:17-19) She stated that the studies showed Ky'Lynn had a large left-sided subdural hematoma, which required surgical intervention. Ky'Lynn was brought into surgery on May 29, 2019, where Dr. Puccioni, a neurosurgeon, drained the fluid off her brain. Ky'Lynn was then transferred to the intensive care unit. (24:4-9) Ky'Lynn's CT and MRI scans showed a large left-sided subdural hematoma, as well as injury to the parenchyma of the brain, meaning the brain

tissue showed signs of injury.(24:14-24) Dr. Haney explained that a subdural hematoma is bleeding between the brain and the skull. (25:1-2)

Dr. Haney testified that surgical intervention was necessary because the blood collection was so large that it was pushing on the Ky'Lynn's brain, which can be a fatal event. (25:3-13) Dr. Puccioni, Ky'Lynn's neurosurgeon, placed a hole in the her skull to relieve the pressure; however, when the bleeding continued, he then had to open up and take a part of Ky'Lynn's skull out so that he could repair the bleeding. (26:1-5)

Dr. Haney testified that she relied upon and review reports from the emergency room physicians, who were the first ones to see the minor child and speak with Appellant. (26:24-25,27:1-2) She learned Appellant had informed the emergency room doctors that Ky'Lynn had been found by Appellant, Ky'Lynn had been well in the morning then later was observed coughing or choking on her bottle, Appellant patted her and put her back down, latter Ky'Lynn was found to be unresponsive. (29:11-16) Appellant specifically denied any trauma and state that he had asked the other children if they had known of any falls Ky'Lynn may have experience, the children denied any falls. (29:17-19)

Dr. Haney was provided information from the physician who conducted the history and physical in the pediatric intensive care unit, and who had the opportunity to talk with Appellant. (29:23-25,30:1-6) Both reports contained similar information, that Ky'Lynn had been well and then choked on a bottle and was later found unresponsive. (31:5-7) Dr. Haney stated it was her understanding that the biological mother was not present when Ky'Lynn became unresponsive; however, it was reported that Appellant was present during the trauma. (44:19-20, 49:21-25)

Furthermore, it was reported that Appellant admitted that the child was in his care solely at the time the child became unresponsive. (53:17-23) According to the ophthalmologist's report,

Ky'Lynn had retinal hemorrhages noted in her left eye that were described as too numerous to count, out to the periphery and in multiple layers. (33:16-18)

Based upon Dr. Haney's review of numerous physicians' reports along with her own examination of Ky'Lynn, she determined that Ky'Lynn had suffered from nonaccidental, abusive head trauma. (34:6) She testified that approximately 20-30 doctors who all had involvement in this case all agreed with her medical diagnosis. (55:6-8) Dr. Haney explained that abusive head trauma is an injury to the head which is the result of abuse somebody inflicted upon her. (34:8-10) She also defined trauma to mean impact or movement of the brain within the skull caused by impact. (72:15-16)

Dr. Haney testified that when Ky'Lynn was first diagnosed with a subdural hematoma, she came up with a list of possible causes. She explained the most likely cause for a subdural hematoma is trauma, which can either be classified as accidental or abusive. (35:1-4) She also took into consideration any previous medical conditions. (35:4-5)

Dr. Haney testified that due to a lack of prior trauma in Ky'Lynn's history, it nearly rules out an accidental trauma. (35:13-14) She was also able to rule out accidental trauma because Ky'Lynn was a three-month-old child unable to crawl or even roll. (35: 14-15) She noted the severity and location of the subdural hematoma also impacted her final diagnosis. (35:18-19) She stated that the subdural hematoma not only covered the entire left side of the skull inside but then was in between both halves.

Dr. Haney explained that once the subdural was evacuated, they were able to see bleeding on the right side of her brain as well. (35:20-23) Dr. Haney stated that this was significant in determining that the trauma was caused by abuse rather than an accident because this medical information is *not consistent* with a single impact from a fall. (35:24)



Dr. Haney added that the information provided from ophthalmology, that Ky'Lynn suffered from retinal hemorrhages, is not consistent with any sort of short household fall, which ultimately ruled out accidental trauma as a diagnosis. (36:1-5) She explained that they do not see this pattern of retinal hemorrhages or the severity of the subdural and its location with a short fall. She also added that Ky'Lynn suffered from a significant brain injury, which is also not consistent with a short fall. (37:2-7)

Additionally, all laboratory results ruled out any prior history of bleeding disorders or infection; thus, abusive head trauma was the only diagnosis that connected with the medical evidence. (36:6-12) Dr. Haney also explained that it is not uncommon for her to see a child who has a severe head injury to not display signs of external injuries. (43:18-21)

Dr. Haney explained that as a result of the brain injury, Ky'Lynn had significant seizures, requiring multiple medications, and was transferred from the Med Center to Children's Hospital because of the acuity of her condition. (42:22-25) These seizures can cause continued brain injury and can also cause her to stop breathing and have hypoxic injuries. (43:9-11) She also stated that it is her understanding that Ky'Lynn will require prolonged treatment for a neurologic injury. (43:1-2)

Dr. Haney stated that Ky'Lynn had been diagnosed with cerebral palsy, which can be created by an injury such as hers. (83:12-21) She explained that cerebral palsy is a medical condition where children don't move correctly because of neurologic damage, and can result in trouble walking or moving, trouble eating or using their hands, and can require lifetime support. (84:6-12)

On cross examination by Appellant's counsel it was mentioned that Ky'Lynn allegedly had been involved in a minor fender bender the week prior to her hospitalization. Dr. Haney

stated that this information does not alter her diagnosis, “Because clearly it was not a severe enough car accident to warrant any medical attention, and – it would not have caused this extent of injuries.” (66:20-23) She also stated that even if Ky’Lynn had an old subdural hematoma, a second impact could cause some rebleeding, but she would not expect it to cause the brain injury or retinal hemorrhages that are present in this case absent a significant impact. (86:22-25)

Furthermore, on cross-examination, counsel asked about the birth-related subdural hematomas. Dr. Haney explained that about 40 percent of infants are born with bleeding. (72:17-23) She stated that, “Usually it’s in the very back underneath the skull, and they’re completely benign and usually resolve within about two to three months.” (72:23-25) She further explained that if the bleeding is not benign, “it’s really obvious at birth. I mean, the kids are unwell. They’re not breathing.” (73:2-4)

Dr. Haney did not find birth-related subdural hematomas as a possible explanation for Ky’Lynn’s injuries because, “There’s never been a report of an unnoticed birth subdural that suddenly becomes something more significant months, years, later.” (73:4-6) Furthermore, she explained, Ky’Lynn’s bleeding was in the wrong location; her bleeding was mostly on the left side of her head, whereas, the birth subdurals are located in the back underneath. (73:18-23)

Dr. Haney also ruled out spontaneous subdural hematomas because these usually occur in older adults, because with age the human brain begins to shrink leaving excess space in the skull which can cause spontaneous bleeding upon impact. (75:9-14)

On cross examination, Dr. Haney explained, “Because infants frequently fall, there’s been some great studies that show that many infants will roll off changing tables, be accidentally dropped by an adult... So, I keep that very high in my differential when I’m dealing with

children who have what appears to be an injury, and, you know, definitely consider that.” (75:5-12)

When asked whether short falls can result in retinal hemorrhaging, Dr. Haney explained “There are some very, very rare case of short fall. Usually there’s something extraordinary about the fall, but yes, they can cause severe injuries.” (76:16-19) She also stated that she is more likely to see a skull fracture with an accidental fall, which is absent from this case. (77:22-23)

Dr. Haney opined that it is very likely Ky’Lynn was shaken and probably slammed because she had unilateral injuries, which she sees most when there’s a significant impact. (76:17-21) When asked when this trauma could have occurred, Dr. Haney explained, “There is a recent paper that shows that the extent of the intraretinal hemorrhages that we saw in Ky’Lynn is probably within the past few days.” (79:8-11)

She also stated that if Ky’Lynn has suffered an injury in the alleged car accident a week prior to her hospitalization she would have been unwell for that entire week. (82:1-4) Furthermore, she stated that had Ky’Lynn been dropped or hit her head by an older sibling a day or two prior to her hospitalization she would have been noticeable unwell during that period, including not responding, significant vomiting, and clinically deteriorating. (82:5-16) She explained that clinically deteriorating means she would have had decreased responsiveness, moaning, and possibly seizing. (82:18-19) When Ky’Lynn was brought to the hospital she was unresponsive, coughing or choking, and actively seizing. (82:22-25)

Dr. Haney also explained on cross examination that it is not unusual to see retinal hemorrhaging in only one eye and to have a subdural hematoma mainly on one side of the brain. (77:1-11) She stated that in cases of a subdural hematoma mainly on one side of the brain, it’s more likely that there was some sort of impact involved. (77:11-15) Furthermore, she testified

that more force must be generated for an abusive head trauma than that which is generated from a short fall. (78:11-14)

The State's second witness was James Zeman, a system administrator at GlobalTel, Inc., a company that manages the inmate telephones at Douglas County Corrections. (89:5- 15). Zeman provided general information regarding the functioning of the inmate telephones. (90:11-92:9). The State sought to use Zeman to authenticate three discs containing telephone conversations recorded on the inmate phone system, but the court sustained objections from Appellant's counsel.

The State then called Detective Lisa Crouch of the Omaha Police Department. (100:5-7) Crouch has been with the Omaha Police Department for approximately 13 years and currently works in the special victims unit, specifically in the child victim and sexual assault unit. (100:12-15) She explained among her professional training, she has received training on how to determine when a child is at risk for harm in their parent's custody. (102:1-3)

Crouch testified she became familiar with Ky'Lynn Jackson when she was brought into the University of Nebraska Medical Center with a brain bleed on May 29, 2019. (104:3-5) She explained her initial step was to go to the Medical Center and speak with the emergency room physicians, where she learned Ky'Lynn had suffered a subdural hemorrhage. (104:13-15)

Crouch's next step in her investigation was to speak with the parents and caregivers of Ky'Lynn to get a basic timeline of events. (107:3-5) She stated that these interviews took place in a consultation room off the waiting room at UNMC, and Appellant was interviewed individually. (107:9-14)

After interviewing Appellant, Crouch was able to form an opinion as to whether Ky'Lynn and her two siblings, Brooklyn and Ky'Ari, would be at risk for harm in their parent's custody.

(114:3-13) Crouch authored an affidavit for removal on May 30, 2019, which was subsequently titled “Exhibit A” and attached to the State’s Ex Parte Motion for Immediate Custody. (T 9)

Detective Crouch’s sworn affidavit stated that on May 29, 2019, Uniformed officers were dispatched to the minor children’s home at 3650 Orchard Ave #307 regarding an unresponsive infant. (T 9) The child, Ky'Lynn Jackson, was transported by an emergency squad to the University of Nebraska Medical Center emergency room. *Id.* She stated that Ky'Lynn was found to be in critical condition with a large hematoma on the left side of the brain which required immediate surgery. *Id.* Medical personnel advised her that the injury was due to trauma. *Id.*

She further wrote that the child had been left in the care of Appellant at approximately 10 a.m. on May 29, 2019, while the biological mother of the child, went to work. (T 9) Appellant was also caring for his 3-year-old daughter, Ky'Ari Jackson, and 7-year-old Brooklyn Smith (Ashley Terry’s child from a previous relationship). *Id.*

Crouch reported that Appellant stated he found the child unresponsive and ran on foot to Terry's job, approximately 4-5 blocks away, to notify her that something was wrong with the child. (T 9) Officers spoke with Ashley Terry and Appellant who did not report any trauma or injuries to the child. *Id.* Both parties reported that Ky'Lynn had been a healthy child with no major health issues. *Id.*

Ashley Terry' reported that she left for work at approximately 10 a.m. on May 29, 2019, and at that time Ky'Lynn was fine. (T 9) Appellant reported that he gave Ky'Lynn a bottle (5 oz) after Ashley left for work and that she ate normal and then went to sleep. *Id.* Appellant reported that later he heard Ky'Lynn cough and went to check on her. *Id.* At that time, he noticed that Ky'Lynn was unresponsive. *Id.* Appellant stated that he attempted to splash water on her to get

her to wake up but there was no response. *Id.* Appellant then went to notify Ashley that something was wrong with Ky'Lynn. *Id.*

Crouch further wrote, Terry and Appellant were the sole caregivers for Ky'Lynn which indicated that the injury happened while in the care of the parents. *Id.* Detective Crouch stated that in her opinion, placement of the minor children into temporary foster care was a matter of immediate and urgent necessity for the protection and safety of the minor children. (T 9-10) In her testimony in Court on November 14, 2019, Crouch stated that it was her opinion that the children would possibly be in harm due to the fact that there was a significant brain injury that was unexplained. (117:20-22)

Crouch testified that her next step in her investigation was to consult with Dr. Haney. (118:1) Then she conducted a second interview with Terry and Appellant at the central police headquarters on June 3, 2019. (118:4-5) Finally, Crouch stated that she always concludes her investigations with an opinion as to whether a crime has been committed. (122:9-12) In this case, Crouch opined that a crime was committed, and subsequently submitted a warrant affidavit for Appellant's arrest. (122:24-25,123:1) Appellant was arrested on June 10, 2019, for felony child abuse resulting in serious injury. (123:2-6)

On Cross examination by the Guardian Ad Litem ("GAL"), Crouch testified that Terry admitted there had been some incidents of domestic violence with Appellant. (125:10-11) Terry stated that some of her and Appellant's argument had turned physical, and that last incident was approximately two weeks prior, where Appellant had thrown a vase in their apartment. (126:2-9) Crouch explained that she became concerned her about violence occurring in the home around the children. (125:24-25) She further testified that, at times, Terry appeared to be fearful when talking about Appellant and his history of domestic violence. (128:21-25) She explained that

Terry would start to cry or look down when talking about Appellant's domestic violence. (129:8-10) Terry never was able to give a reasonable explanation as to how Ky'Lynn sustained her injuries. (129:11-14)

Crouch testified that, in her first interview with Appellant at UNMC, he appeared concerned about the children being taken away, even though Crouch did not indicate that the children were being removed. (130:4-9) Crouch stated that she found Appellant's behavior concerning because his initial concern was that children would be taken away. (130:14) Crouch stated that she believed a parent's initial and natural reaction would be for the well-being of their child. (155:6-7) In her second interview with Appellant, Crouch stated that Appellant still had no idea what happened to Ky'Lynn. (131:4-5)

Crouch testified that between the two interviews, Appellant had different theories on how it is possible Ky'Lynn could have sustained her injuries. (131:6-10) She explained that Appellant mentioned on May 29<sup>th</sup> that Brooklyn, the eight-year-old sibling, was holding Ky'Lynn and accidentally hit her head on the edge of the couch. (131:12-15) Appellant later mentioned, on June 3<sup>rd</sup>, a car accident which they were rear-ended a couple of days prior to May 29. (131:16-18)

Crouch testified that the car accident was not reported to police, but Terry also reported a car accident occurred. (132:11) However, Terry reported that Ky'Lynn was in a five-point harness car seat and was completely buckled into that car seat when they were rear-ended. (132:12-15) Crouch observed the vehicle involved in the accident and noted very minimal, if any, damage to the rear of the vehicle. (132:16-18)

Crouch stated she discussed all these theories, given by Appellant, with Dr. Haney. (133:1-8) She stated that in her conversations with Dr. Haney and throughout her investigation,

none of those theories lined up with the injuries Ky'Lynn sustained. (133:9-12) Crouch was informed by Dr. Haney that, "specifically it was not a result of the car accident that was described or the bumping her head on the couch." (133:18-20) She also learned from Dr. Haney that, "the symptoms of this type of injury would be almost immediate; the lethargic, vomiting, unresponsiveness would be almost immediate after the injury occurred." (171:18-21)

On cross examination by Counsel for the biological mother, Crouch testified that Terry and Appellant reported she left a happy healthy baby, Ky'Lynn, in the sole care of Appellant and went to work on May 29, 2019. (140:12-15) The next time Terry saw Ky'Lynn was after Appellant ran to her place of work and told her Ky'Lynn was unresponsive. (141:14-20)

Crouch testified that during the course of her investigation she learned of a report made by Brooklyn, in which she reported to her school that she had been physically harmed by Appellant. (148:11-13) She stated that this report was made within a year prior to this case but that Appellant was never charged. (148:2-4)

She learned that Appellant did not live with Terry and her three children, but he had taken on the role as the daily caregiver for the minor children while Terry worked. (157:17-25) Crouch also learned that on the day of the incident, when Ky'Lynn was unresponsive, he woke up Brooklyn and went to get water and splash it on Ky'Lynn's face. Crouch stated that it was concerning to her that Appellant's first response was to wake up the eight-year-old child to help him. (166:18-25) She also stated that it was concerning to her that Appellant's next response was to splash water on the unresponsive child's face. (167:1-3)

Appellant then left his apartment building, leaving the all three children, including an unresponsive child, unattended while he ran several blocks to Terry's work. (158:17-22) Appellant did not have a car or cell phone at that time. (158:23-25,159:1-3) However, Crouch



testified that Appellant could have gone to the apartment office and have someone call 911 but instead ran roughly six blocks to get Terry to call 911. (159:4-13)

Crouch testified that the factors she considered in determining a crime had been committed by Appellant were the infant's significant brain injury, along with Appellant's history of domestic violence, to Appellant being the sole caregiver at the onset of Ky'Lynn's symptoms. (163:9-20)

The next witness called by the State was Paige Worley, a family permanency specialist at St. Francis Ministries. (173:7-12). Worley became involved in this case in June of 2019. (181:12) Worley testified that she relied, in part, on four intakes that documented instances in which individuals did not believe the children were safe. (185:3-4) She explained that an intake is when a call is made to their hotline stating that the children were not safe in the care of either Terry or Appellant. (185:6-10) The first and second intake do not pertain to Appellant.

In an offer of proof made by the State, Worley testified the third intake was regarding domestic violence that was reported by Brooklyn. (190:22-24) She further explained that Brooklyn reported domestic violence between Terry and Appellant, where Appellant pushed and punched Terry. (191:1-8) The fourth intake was regarding the incident that took place on May 29<sup>th</sup> resulting in Ky'Lynn's injuries. (191:9-12) After the offer of proof, the Court sustained counsel's prior objection. On Cross examination by the GAL, Worley testified that the intakes demonstrated a pattern of domestic violence, which sometimes led to injury of the children. (225:19-21) She further stated that such patterns are important to consider because the pattern is likely to continue. (229:1)

Worley also relied on the recorded police interviews conducted by Officer Crouch in determining an opinion as to the minor children's permanency. She stated that the interviews

outlined Terry and Appellant's timeline of events prior to the injury. (198:24-25) She also stated that the interviews gave her more information about Appellant's abusive relationship with Terry. (199:3-6)

Worley relied upon the forensic interviews conducted on May 30, 2019, of Appellant's daughter and of Brooklyn. She stated that the information provided to her was that Brooklyn and Ky'Ari's interviews outlined domestic violence between Appellant and Terry, as well as physical abuse that the children had also experienced. (200:16-24) In her forensic interview, Brooklyn expressed that the physical abuse had occurred more than one time. (251:2-7) In Ky'Ari's interview she expressed that Appellant had physically abused her. (252:1-3)

She also relied on the consult conducted by Dr. Haney, which outlined the current and ongoing medical conditions Ky'Lynn faces. (208:22-23) Worley testified that Ky'Lynn was diagnosed with cerebral palsy and will have to accommodate a lot in her life. (209:2-3) She also stated that she is uncertain that the parents would be able to care for Ky'Lynn's medical needs while also caring for their other two children. (209:19-21)

Worley opined that, as it relates to Appellant, it is in Ky'Ari's best interest to terminate Appellant's parental rights. (256:23-24,257:3) Worley stated that she relied upon the results of Ky'Lynn's injuries, the potential of a continued pattern of abuse, the past intakes, along with her interaction with the parents, family, and collateral contacts in determining the best interest of Ky'Ari. (256:11-22) She explained that Appellant has a history of violence and physical abuse, some of which was disclosed by Brooklyn and Ky'Ari, along with the trauma to Ky'Lynn; she stated, "I would be concerned that another child could sustain more injuries as a result." (258:6-11)

Worley stated that she formed an opinion, based on the information provided to her, that Appellant was responsible for the harm to Ky'Lynn. (287:2-15) Furthermore, Worley expressed there is a point where someone has injured a child in which she no longer believes they deserve a chance at reunification. (288:16-24) Based on the belief that Appellant injured Ky'Lynn, Worley testified she believes Appellant has surpassed the point where she is willing to take a risk of placing a child back in his custody regardless of the bond he may have with his child. (289:1-5)

On December 2, 2019, a second adjudication hearing took place regarding the State's Amended Supplemental Petition and Motion for Termination of Parental Rights. The last witness called by the State was Carrie Hillebrandt, a therapist at Hill Counseling & Consulting. (300:17-358:10) Brooklyn was a client of Hillebrandt's following Ky'Lynn's hospitalization. (308:13-25) Hillebrandt explained that when she begins meeting with a new client, she conducts an initial diagnostic interview ("IDI"). Part of this interview entails collecting collateral information from the State family permanency specialist, any other previous treatment and intake documentation, police reports, medical reports, and child protective service history. (303:5-14)

In this case, Hillebrandt was also able to interview with Ashley Terry, to gain background information on Brooklyn. She learned of the long history of domestic violence that took place between Terry and Appellant, and that Terry was terrified of Appellant. (328:1-13) Terry also informed her that the children were present at times when Appellant engaged in domestic violence. (328:18-23)

Upon completion of the IDI, Hillebrandt authors a treatment plan which summarizes the goals and objectives of the treatment recommendations. (307:8-13)

Brooklyn Smith became Hillebrandt's client July 11, 2019. (308:13-20) After gathering all collateral information, Hillebrandt created a treatment plan for Brooklyn to focus on trauma. (314:17-18) She explained that a trauma-focused therapist, like herself, has more training and specific training in trauma, working with children and families with trauma. (321:17-21) Hillebrandt created this plan based on the information provided to her when conducting her IDI. (314:19) Brooklyn's treatment plan included psychoeducation, learning coping skills, processing through feelings, and connecting behaviors, actions, and feelings. (314:20-22)

Hillebrandt explained that during Brooklyn's weekly therapy meetings, she would typically get an update from the foster parents prior to or after her session with Brooklyn. (317:4-11) She explained that this is important for her to know what's going on right then in her life, including if there had been any trauma triggers presented that week. (317:17-21)

Hillebrandt testified that Brooklyn has made multiple statements regarding domestic violence, neglect, and abuse. (318:8-18) She explained that Brooklyn has made reference to her mother being hurt by her dad, who she identifies as Appellant. (320:1-3) On cross examination, Hillebrandt clarified that Brooklyn refers to her biological father by his first name and not by dad, but she referred to Appellant as dad. (338:23-25;3391-4)

Brooklyn also made comments about being afraid Appellant was going to hit her mom in the face again or step on her face again. (320:3-5) Hillebrandt stated that Brooklyn initially demonstrate trauma symptoms such as nightmares, behavioral issues, aggression, depression, anger, and confusion. (322:1-4) Brooklyn was also, "terrified that her sister was not alive." (322:4-5)

Hillebrandt testified that the Brooklyn has made statements about the events that took place on May 29, 2019. Brooklyn disclosed to her that her and Ky'Ari were sent to their rooms

and Ky'Lynn and Appellant remained in a different room. She heard her sister crying and Appellant yelling. The next time Brooklyn saw her sister, she stated that she thought she was dead. (330:7-12) Hillebrandt testified that most of what Brooklyn talks about is the domestic violence. (332:21-22) She talks about being hurt by watching her mom get beat on, and about being worried Appellant would do it again. (332:23-25) Hillebrandt explained, "any child who witnesses that type of trauma builds unhealthy coping strategies and are high risk to repeating those patterns." (333:17-19)

During the course of Hillebrandt's testimony Appellant continually interrupted the Court, despite the Judge's warnings. Eventually, after repeated disturbances, Appellant was held in contempt of court and escorted from the court room. (335:22-23)

On cross examination, Hillebrandt explained that she never prompted Brooklyn or continue to ask her questions regarding domestic violence. (341:3-8) She further explained that she does not ask Brooklyn yes or no, closed-ended questions, she only asks open ended questions. (353:23-25) Her goal is to let Brooklyn disclose her trauma and work on connecting those feelings associated with her trauma; further down the road, when Brooklyn is ready, she will walk with her through a trauma narrative where she can go into more details regarding the abuse. (356:16-24) She stated that it is typical that her trauma story evolves as they become more comfortable with each other and herself. (357:24-25;358:1-2)

This concluded the presentation of evidence and all parties rested. The Court took the matter under advisement. (368:1-2) On December 9, 2019, the court issued an order which found all of the allegations against Appellant to be true by clear and convincing evidence and terminated his parental rights with respect to Ky'Ari. (T63-67). Appellant appeals these decisions.

## **ARGUMENT**

### **I.**

#### **THE SEPARATE JUVENILE COURT WAS CORRECT IN FINDING THAT THE MINOR CHILD WAS WITHIN THE MEANING OF *NEB. REV. STAT. § 43-247(3)(A)*.**

The Separate Juvenile Court of Douglas County did not err in finding, by a preponderance of the evidence that the minor child was within the meaning of *Neb. Rev. Stat. § 43-247(3)(A)*. The Juvenile Court shall have jurisdiction over any juvenile who lacks proper parental care by reason of the faults or habits of his or her parent. *Neb. Rev. Stat. § 43-247 (3)(a)*. A child may be found within the meaning of *Neb. Rev. Stat. § 43-247 (3)(a)* when the juvenile lacks proper parental care due to the reason or the fault or habits of his or her parent, guardian, or custodian. *Id.* In a case brought under § 43–247(3)(a), the state must prove its allegations by a preponderance of the evidence. *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992).

The State need not prove that the juvenile has actually suffered harm, but must establish that without intervention, there is a definite risk of future harm. *In re Carrdale H. II*, 781 N.W.2d 622 (2010). The juvenile court does not have to wait for harm to befall a minor child in order to acquire jurisdiction over said child. *In re Justine J.*, 286 Neb. 250, 253, 835 N.W.2d 674, 677-678 (2013). Additionally, the juvenile court is not required to wait for disaster before acquiring jurisdiction over a juvenile, and therefore identifying specific evidence of harm or risk of harm is unnecessary. *In re Interest of Chloe P.*, 2013, 840 N.W.2d 549.

The purpose of the adjudication phase is to protect the interests of the child. *In re Laticia S.*, 21 Neb. App. 921, 928, 844 N.W.2d 841, 848 (2014). Accordingly, the trial court's findings

will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of J.S.*, 1 Neb. App. 518, 519, 499 N.W.2d 89, 90 (1993).

The State has alleged that Ky'Ari Jackson lacks proper parental care by reason of the fault or habits of Appellant, her father to wit: (A) Appellant was a caregiver of Ky'Lynn Jackson; (B) Ky'Lynn Jackson was transported to the hospital due to being unresponsive; (C) At the hospital, Ky'Lynn Jackson was diagnosed with injuries consistent with intentional physical abuse; (D) Appellant was unable to provide a reasonable explanation for Ky'Lynn's injuries; (E) Appellant has failed to provide, proper parental care, support and/or supervision for said juveniles; (F) Due to the above allegation, said juveniles are at risk for harm. The State presented sufficient evidence to show the minor child lacked proper parental care by reason of the fault or habits of Appellant. (T 37)

The minor child at issue in this case is Ky'Ari Jackson, Appellant's biological daughter. However, it is important to note that Appellant had taken on a parental, caretaker role over all three of Ashley Terry's children. Based on the evidence presented, the State has shown that Appellant has a history and pattern of abuse and violence. The minor child need not suffer actual abuse from Appellant to be at risk for harm.

Appellant admitted he was the sole caretaker of Ky'Lynn when she suffered abusive head trauma. Appellant cannot give a reasonable explanation for how she received these injuries. Appellant's theories on how her injury occurred changed between interviews, and neither theory matched a possible explanation for the severity of Ky'Lynn's injury. Dr. Haney stated that Ky'Lynn's injuries were too severe to have been caused by bumping her head on the couch.

Furthermore, a minor car accident that occurred a week prior would not have resulted in such a severe brain injury. This is especially true considering the child was proper strapped into a

baby car seat. The accident was so minor that Detective Crouch observed very minimal damage to the vehicle and no police report was made after the accident. Even so, Dr. Haney explained that due to the severity of Ky'Lynn's head trauma, she would have immediately demonstrated very noticeable symptom such as vomiting, seizing, and unresponsiveness. Thus, a minor car accident or head bump that occurred days and even a week prior would not have resulted in the symptoms displaying on May 29<sup>th</sup>.

Worley testified that, based on her review of the case, she believes Appellant is responsible for Ky'Lynn's injury. Dr. Haney reported that her brain injury was consistent with being shaken combined with forceful impact. Furthermore, Brooklyn disclosed in her trauma therapy that Appellant was alone with Ky'Lynn in a separate room, when she heard him yelling and Ky'Lynn crying. Based on the totality of the circumstances, reason points to only one explanation, Appellant is the only responsible for Ky'Lynn's abusive head trauma, which left her permanently injured.

Ky'Lynn was not the only child under Appellant's care that has experienced his abuse. Detective Crouch testified that Ashley Terry admitted Appellant had a history of domestic violence, including a recent incident that occurred only two weeks before Ky'Lynn's injury. Terry also admitted to Hillebrandt that Appellant had, at times, abused her in front of the minor children. This is corroborated by Brooklyn's extensive disclosed in trauma therapy regarding her fear of Appellant's violence. She specifically disclosed being fearful of Appellant punching and kicking her mother's face again.

As a result of witnessing Appellant's continued abuse towards her mother, eight-year-old Brooklyn, has demonstrated trauma-based symptoms. The Court need not wait for the minor child to demonstrate symptoms of trauma to find she is at risk of harm by Appellant's violence



behaviors. Thus, Worley correctly concluded that the due to Appellant pattern of domestic violence with the minor children's mother and her other minor children, Ky'Ari is at risk for harm.

Accordingly, the Juvenile Court did not err in finding, by a preponderance of the evidence, that Ky'Ari Jackson lacks proper parental care by reason of the fault or habits of Appellant and comes within the meaning of Section § 43-247(3a).

## **II.**

**THE SEPARATE JUVENILE COURT WAS CORRECT IN FINDING THAT THE MINOR CHILD WAS WITHIN THE MEANING OF *NEB. REV. STAT. §§ 43-292* (2), (8), (9), AND (10)(D).**

A parent's right to their child can be terminated upon showing sufficient evidence exists that termination of the parental rights is in the best interest of the minor and that it appears by the evidence that one or more of the conditions listed in the eleven subsections exist. *Neb. Rev. Stat. § 43-292*. Under *Neb. Rev. Stat. § 43-292*, any one of the eleven grounds can serve as a basis for the termination of parental rights when combined with evidence that termination is in the best interests of the child. *In re Sir Messiah T.*, 279 Neb. 900 (2010).

The State presented sufficient evidence to prove, by clear and convincing evidence, that the minor child came within *Neb. Rev. Stat. §§ 43-292* (2), (8), (9), (10)(d), and that it was in the juvenile's best interest, the court was correct in terminating Appellants' parental rights.

**a. The juvenile court was correct in finding the minor children to be within the meaning of *Neb. Rev. Stat. § 43-292 (2)*.**

The court correctly determined the juveniles come within the meaning of *Neb. Rev. Stat. § 43-292 (2)* in that Appellant has substantially and continuously or repeatedly neglected and refused to give his child necessary parental care and protection.

According to *Neb. Rev. Stat. § 43-292(2)*, the court may terminate all parental rights between the parents of a child, for neglect, when the court finds such action to be in the best interest of the child; and the evidence shows that the parent has substantially and continuously or repeatedly neglected and refused to give the child or a sibling of the child necessary parental care and protection. *Neb. Rev. Stat. § 43-292(2)*. “A ‘neglected child’ is a child under eighteen years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals or well-being of such child.” *In re Hartman*, 188 Neb. 682 (1972).

The court was correct in finding that Appellant had substantially and continuously or repeatedly neglected and refused to give said juvenile or a sibling of the juvenile necessary parental care and protection.

The Supreme Court of Nebraska has held although incarceration itself may be involuntary, as far as the parent is concerned, the criminal conduct causing the incarceration is voluntary. *In re Interest of Zanaya W.*, 291 Neb. 20, 863 N.W.2d 803 (2015). The Court has stated, “A father’s actions which resulted in incarceration were, every bit as voluntary as if he had purchased a ticket for a 6, 7, or 8 year trek into Siberia, and that the father had just as effectively placed himself in a position where he could not possibly offer his presence, care,

love, protection, maintenance, and opportunity for displaying parental affection.” *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990).

Appellant’s actions placed him in a position where he could not offer his presence, care, love, protection, maintenance, and opportunity for displaying parental affection towards the minor child. Appellant was arrested on June 10, 2019 and was formally charged with one count of child abuse resulting in serious bodily injury, a class two felony, due to Ky’Lynn’s abusive head trauma. In a preliminary hearing before the Douglas County Court, the Honorable Judge Vaughn bound over the State’s case to the District Court on July 24, 2019, finding probable cause to believe the defendant guilty. Appellant remains incarcerated awaiting trial to be heard before the District Court on September 14, 2020.

Although Appellant’s incarceration while awaiting trial is involuntary, his actions against the minor child’s siblings has placed him in a position where he cannot offer his care and support. Appellant has remained incarcerated from June 10, 2019, to current. Accordingly, Appellant has not been involved in the minor child’s life. Appellant’s actions towards another minor has placed him a position where he cannot offer his presence, care, love, protection, maintenance, and affection towards the minor child. Therefore, Appellant’s voluntary action which resulted in his incarceration, is a factor to be considered in this case, and supports the court’s finding that the juveniles come within the meaning of *Neb. Rev. Stat.* § 43-292(2).

Furthermore, neglect under this subsection is demonstrated by “indifference or intention to abandon or neglect” on the part of a parent toward their child. *In re Interest of Chance J.*, 17 Neb. App. 645, 657, 768 N.W.2d 472, 481 (2001). The evidence provided by the State, shows that Appellant has a history of domestic violence with the minor child’s mother. Terry admitted to Detective Crouch and Hillebrandt that, at times, such abuse occurred in the presence of the

minor children. Worley stated that both the minor child and Brooklyn disclosed abused on part of the Appellant. Appellant intentionally put his child at extreme risk for harm when he engaged in abusive conduct with Terry in the presence of the minor child. Terry disclose that Appellant recently threw a vase. Such pattern of abusive conduct places the minor child at risk for harm. This is a blatant display of indifference and intention of neglect on the part of Appellant towards his child.

Furthermore, as stated previously, Appellant was the sole caretaker at the time of Ky'Lynn's injury. Appellant cannot offer a reasonable explanation for her injuries. Dr. Haney explained that due to the severity of Ky'Lynn's brain injury, it is the result of abuse and forceful impact. Furthermore, Brooklyn disclosed that Appellant was along with Ky'Lynn yelling at her while she cried. The evidence presented indicates Ky'Lynn's injuries were the result of Appellants abusive conduct. Accordingly, Appellant has demonstrated a significant lack of parental care and protection. The Court need not await for such abuse to occur to the minor child to find Appellant has substantially failed to offer proper parental care.

Given the evidence presented by the State, there has been continual and repeated neglect of the child by Appellant. The testimony provided to the juvenile court established proof by clear and convincing evidence that Appellant substantially neglected the minor child and refused to give proper parental care and protection. Therefore, the juvenile court was correct in finding the children to be within the meaning of *Neb. Rev. Stat. § 43-292(2)*. Accordingly, this Court should affirm the decision of the juvenile court in terminating Appellant's parental rights to said minor child.

**b. The juvenile court was correct in finding the minor children to be within the meaning of *Neb. Rev. Stat. § 43-292 (9)*.**

Under *Neb. Rev. Stat. § 43-292 (9)*, termination of parental rights is warranted if the parent of a juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. *Neb. Rev. Stat. § 43-292(9)*. Aggravated circumstances have been held to embody the concept that the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and place the child in a position to be re-abused. *In re Interest of Jac'Quez N.*, 266 Neb. 782 (2003).

The Nebraska Supreme Court, citing *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 76, 824 A.2d 213, 233 (2003), noted that the determination of whether aggravated circumstances exist must be made on a case-by-case basis and that in establishing criteria to determine the existence of aggravated circumstances, certain common themes exist. These include if reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be re-abused. *In re Jac'Quez N.*, 266 Neb. 782, 790-792 (2003).

According to the testimony of Dr. Haney, it is very likely Ky'Lynn was shaken and probably slammed because she had unilateral injuries, which she sees most when there's a *significant impact*. (76:17-21) Appellant was the only caretaker responsive for Ky'Lynn at the time of her injury. Furthermore, Dr. Haney explained that as a result of her brain injury, Ky'Lynn has had significant seizures, requiring multiple medications. (42:22-25) She explained these seizures can cause continued brain injury and can also cause her to stop breathing and have

hypoxic injuries. (43:9-11) She also stated that it is her understanding that Ky'Lynn will require prolonged treatment for a neurologic injury. (43:1-2)

Dr. Haney also stated that Ky'Lynn had been diagnosed with cerebral palsy, which can be created by an injury such as hers. (83:12-21) She explained that cerebral palsy is a medical condition where children don't move correctly because of neurologic damage, and can result in trouble walking or moving, trouble eating or using their hands, and can require lifetime support. (84:6-12)

Such a severe and long-term injury, which occurred under Appellant's care, certainly constitutes an aggravated circumstance. This significant injury required emergency neurosurgical intervention and it was reported that Ky'Lynn had even stopped breathing. Dr. Haney opined that this is only the result of the child being *slammed and shaken*. Appellant cannot offer a reasonable explanation for her injuries that match the medical diagnosis. Thus, Worley was correct in her belief that Appellant caused such injury to Ky'Lynn.

Worley reasoned that due to Appellant's history of violence and physical abuse, some of which was disclosed by Brooklyn and Ky'Ari, along with the trauma to Ky'Lynn; she stated, "I would be concerned that another child could sustain more injuries as a result." (258:6-11) Furthermore, Worley expressed there is a point where someone has injured a child in which she no longer believes they deserve a chance at reunification. (288:16-24) Based on the belief that Appellant injured Ky'Lynn, Worley was correct in her belief that Appellant has surpassed the point where she is willing to take a risk of placing a child back in his custody regardless of the bond he may have with his child. (289:1-5)

Appellant's actions clearly constitute aggravated circumstances, because of the severity and life-threatening injury that resulted to Ky'Lynn while under the care of Appellant. This

abuse and neglectful action of Appellant was so severe, that to attempt reunification would jeopardize and compromise the safety of the minor child and place the child in a position to be re-abused. Therefore, the juvenile court was correct in finding the minor child to be within the meaning of *Neb. Rev. Stat. § 43-292 (9)*.

**c. The juvenile court was correct in finding the children to be within the meaning of *Neb. Rev. Stat. § 43-292 (10)(d)*.**

Under *Neb. Rev. Stat. § 43-292 (10)(d)*, termination of parental rights is warranted when the parent has committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent. According to *Neb. Rev. Stat. § 28-310*, a person commits a felony assault if he intentionally, knowingly, or recklessly, causes bodily injury to another person. The Nebraska Supreme Court has held that the intent requirement is related to the assault, not the injury which results. *State v. Williams*, 243 Neb. 959, 503 N.W. 2d 561 (1993).

As previously mentioned, the State has provided sufficient evidence to prove Appellant recklessly caused severe bodily injury to Ky'Lynn, the minor child's infant sibling. Although Appellant is not the biological parent of Ky'Lynn, she is the sibling of his child. Furthermore, Appellant admitted he had taken on the role of the minor children's daily caretaker. Testimony from Hillebrandt indicated that Brooklyn referred to Appellant as her dad. At the time of her injury, Ky'Lynn was only three months old. For all intents and purposes Appellant had taken on the role as father to all three minor children.

The evidence presented clearly shows that reunification would jeopardize and compromise the safety of the child and put her in a position of unreasonable harm to be re-abused. Therefore, because Appellant intentionally, knowingly, or recklessly caused serious bodily injury to a minor child in his supervision, which satisfies the requirements of *Neb. Rev.*

*Stat.* § 28-310, the juvenile court was correct finding the minor child to be within the meaning of *Neb. Rev. Stat.* § 43-292(10)(d).

Furthermore, the Separate Juvenile Court was correct in finding that reasonable efforts to preserve and reunify the family was not required due to the aforementioned aggravating circumstances. Under *Neb. Rev. Stat.* § 43-283.01, reasonable efforts to reunify the family are not required in some circumstances. *Neb. Rev. Stat.* § 43-283.01 (4)(a) states that reasonable efforts are not required if the parent has subjected the juveniles or another minor juvenile to aggravated circumstances.

Additionally, *Neb. Rev. Stat.* § 43-283.01 (4)(b)(iv) states that reasonable efforts are not required if the parent has committed a felony assault which results in serious bodily injury to the juveniles or another minor child of the parent. Because the State proved by clear and convincing evidence that Appellant subjected juveniles to aggravated circumstances, and that Appellant committed a felony assault which resulted in serious bodily injury to the juvenile, the court was correct in finding that no reasonable efforts were required.

Therefore, the Court is urged to affirm the Separate Juvenile Court's finding that the children are within the meaning of *Neb. Rev. Stat.* § 43-283.01(4)(a).

### **III.**

#### **THE SEPARATE JUVENILE COURT WAS CORRECT IN FINDING THAT THE TERMINATION OF APPELLANT'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF THE MINOR CHILD.**

A parent's right to their child can be terminated upon showing sufficient evidence exists that termination of the parental rights is in the best interest of the minor and it appears by the evidence that one or more of the subsection conditions exist. *Neb. Rev. Stat.* § 43-292.



Ultimately the primary consideration in determining whether to terminate parental rights is a determination of what is in the best interest of the child. *In re Interest of J.H.*, 242 Neb. 906, 910-911 (1993). Generally, a child's best interests are presumed to be served by having a relationship with his or her parent. *In Re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016). This presumption is overcome only when the State proves the parent is unfit. *Id.*

Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In Re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016). The best interest analysis and the parental unfitness analysis are fact-intensive inquiries, and while both are separate inquiries, each examines essentially the same underlying facts as the other. *Id.* "The evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interest of the juvenile, as it would show abandonment, neglect, unfitness, or abuse." *In re Interest of Joseph S.*, 291 Neb. 953, 963 (2015).

The presumption that the minor child's best interests are served by having a relationship with her father is overwhelmingly rebutted in this case, as there is extensive evidence showing Appellant is an unfit parent. Appellant clearly has a personal deficiency or incapacity which has prevented performance of a reasonable parental obligation in child rearing and has caused detriment to the minor child's well-being. The evidence discussed above, shows that Appellant was responsible for the severe injuries of a minor child who was in his care, which clearly has caused detriment to the child's well-being.

Furthermore, the evidence discussed above demonstrates Appellant's continued pattern of domestic violence and abuse. It was testified to that Appellant engaged in domestic violence with

Terry in the presence of the minor children. The oldest child has demonstrated trauma-based symptoms such as fear that Appellant will *punch and kick her mother again*. The Court need not wait for Ky'Ari to mature to an age where she too will demonstrate trauma symptoms due to Appellant's violent behaviors.

As discussed above, Worley was correct in stating there is a point where someone has injured a child in which she no longer believes they deserve a chance at reunification. (288:16-24) Based on the belief that Appellant injured Ky'Lynn, Appellant has surpassed the point where Worley is willing to take a risk of placing a child back in his custody regardless of the bond he may have with his child. (289:1-5)

Based on the evidence presented, Appellant is an unfit parent. Appellant's deficiency or incapacity has prevented him from performing reasonable parental obligations in child rearing. Therefore, the presumption that the child's best interest is served by having a relationship with her father is overwhelmingly overcome. For these reasons, the Court is urged to affirm the Separate Juvenile Court's ruling that termination of Appellant's parental rights was in the minor child's best interests.

### **CONCLUSION**

For the aforementioned reasons, the Separate Juvenile Court of Douglas County was correct in finding, by clear and convincing evidence, Ky'Ari Jackson to be within the meaning of *Neb. Rev. Stat.* §§ 43-292(2), (9), and (10). The Court was also correct in finding that no reasonable efforts were required under *Neb. Rev. Stat.* § 43-283.01, and that the termination of Appellant's parental rights was in the best interests of said juveniles. Thus, the State respectfully requests this Court to affirm the decision of the Separate Juvenile Court for Douglas County, Nebraska.

Respectfully Submitted,  
STATE OF NEBRASKA

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# Certificate of Service

I hereby certify that on Monday, April 27, 2020 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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